

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CARL DEMONZE LOVE,
Plaintiff,
v.
CDCR HEALTH CARE SERVICES, et
al.,
Defendants.

No. 2:21-cv-0652 DJC CKD P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a California prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. On December 9, 2021, the court screened plaintiff's amended complaint as the court is required to do under 28 U.S.C. § 1915A(a). The court found that plaintiff could proceed on claims for inadequate medical care arising under the Eighth Amendment against defendants Dr. Alomoda¹ and Nurse Burley. The court ordered service of process on those defendants (ECF No. 13) and answers were filed by Burley (ECF No. 23) and Alamutu (ECF No. 33). Defendants Alamutu and Burley (defendants) now move for summary judgment. ECF No. 46.

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¹ Defendant Alamutu is identified as "Dr. Alomoda" in the First Amended Complaint but was subsequently identified as Nurse Practitioner O. Alamutu.

1 I. Summary Judgment Standard

2 Summary judgment is appropriate when it is demonstrated that there “is no genuine
3 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
4 Civ. P. 56(a). A party asserting that a fact cannot be disputed must support the assertion by
5 “citing to particular parts of materials in the record, including depositions, documents,
6 electronically stored information, affidavits or declarations, stipulations (including those made for
7 purposes of the motion only), admissions, interrogatory answers, or other materials. . .” Fed. R.
8 Civ. P. 56(c)(1)(A).

9 Summary judgment should be entered, after adequate time for discovery and upon motion,
10 against a party who fails to make a showing sufficient to establish the existence of an element
11 essential to that party’s case, and on which that party will bear the burden of proof at trial. See
12 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). “[A] complete failure of proof concerning an
13 essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”
14 Id.

15 If the moving party meets its initial responsibility, the burden then shifts to the opposing
16 party to establish that a genuine issue as to any material fact actually does exist. See Matsushita
17 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the
18 existence of this factual dispute, the opposing party may not rely upon the allegations or denials
19 of their pleadings but is required to tender evidence of specific facts in the form of affidavits,
20 and/or admissible discovery material, in support of its contention that the dispute exists or show
21 that the materials cited by the movant do not establish the absence of a genuine dispute. See Fed.
22 R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the
23 fact in contention is material, i.e., a fact that might affect the outcome of the suit under the
24 governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv.,
25 Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is
26 genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving
27 party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

28 In the endeavor to establish the existence of a factual dispute, the opposing party need not

1 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
 2 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
 3 trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce
 4 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”
 5 Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee’s note on 1963
 6 amendments).

7 In resolving the summary judgment motion, the evidence of the opposing party is to be
 8 believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the
 9 facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475
 10 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s
 11 obligation to produce a factual predicate from which the inference may be drawn. See Richards
 12 v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902
 13 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than
 14 simply show that there is some metaphysical doubt as to the material facts Where the record
 15 taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
 16 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

17 II. Plaintiff’s Allegations

18 In his amended complaint (ECF No. 11), signed under the penalty of perjury, plaintiff
 19 alleges as follows:

20 1. Defendant Alamutu

21 Defendant Alamutu knew plaintiff had a broken bone in his right thumb² after viewing x-
 22 rays and failed to provide plaintiff with any care for the broken bone. Attending physician Dr.
 23 Dobak requested that plaintiff have surgery, but Alamutu denied the request.

24 Other than approve the request for surgery, plaintiff does not suggest specifically what
 25 action Alamutu should have taken.

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 27 ² In the amended complaint, plaintiff asserts he had broken bones in his hand. However, other
 28 parts of the record establish that plaintiff had a broken bone in his right thumb and plaintiff does
 not dispute this.

1 2. Defendant Burley

2 Defendant Burley was also aware of plaintiff's broken bone, but, despite numerous
3 requests for medical aid, indicated there was nothing she could do except provide plaintiff with a
4 makeshift cardboard splint instead of a "medical splint." Plaintiff alleges that Burley should have
5 provided him with a "medical splint," but does not suggest any other action Burley should have
6 taken.

7 III. Medical Care Under the Eighth Amendment

8 A violation of the Eighth Amendment occurs if denial or delay of medical care amounts to
9 at least deliberate indifference to serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104-05
10 (1976).

11 A plaintiff can show a "serious medical need" by demonstrating that "failure to treat a
12 prisoner's condition could result in further significant injury or the 'unnecessary and wanton
13 infliction of pain.'" Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) citing Estelle, 429 U.S. at
14 104. "Examples of serious medical needs include '[t]he existence of an injury that a reasonable
15 doctor or patient would find important and worthy of comment or treatment; the presence of a
16 medical condition that significantly affects an individual's daily activities; or the existence of
17 chronic and substantial pain.'" Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000) citing
18 McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1991).

19 "Deliberate indifference" includes a purposeful act or failure to respond to a prisoner's
20 pain or possible medical need. Jett, 439 F.3d at 1096. Mere delay of medical treatment, "without
21 more, is insufficient to state a claim of deliberate medical indifference." Shapley v. Nev. Bd. of
22 State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). Where a prisoner alleges that delay of
23 medical treatment evinces deliberate indifference, the prisoner must show that the delay caused
24 "significant harm and that Defendants should have known this to be the case." Hallett v. Morgan,
25 296 F.3d 732, 745-46 (9th Cir. 2002); see McGuckin, 974 F.2d at 1060.

26 IV. Argument and Analysis

27 Defendants argue that there is no genuine issue of material fact that Alamutu or Burley
28 were at least deliberately indifferent to plaintiff's broken bone in his right thumb.

1 A. Nurse Practitioner Alamutu

2 In her declaration in support of defendants' motion to for summary judgment (ECF No.
3 46-6), Nurse Practitioner Alamutu avers:

4 1. She met with plaintiff on February 18, 2020, at the California Medical Facility (CMF)
5 for complaints about right thumb pain and noted swelling around the base of plaintiff's right
6 thumb. She ordered immediate x-rays and a cold compress.

7 2. X-rays revealed a broken bone in plaintiff's thumb and soft tissue swelling. No
8 significant degenerative changes were noted. As a result, Alamutu ordered "an urgent orthopedic
9 surgery consultation and a splint for [plaintiff's] right thumb, Tylenol 3,³ Ibuprofen, Vistaril,⁴ a
10 cold compress for use four times a day." The surgery consult was scheduled for March 19, 2020.

11 3. On March 19, 2020, Alamutu was informed by the Chief Physician and Surgeon at
12 CMF that, due to COVID 19, plaintiff's surgery consult would be cancelled and rescheduled for a
13 later date. Alamutu was instructed to inform plaintiff of the decision which she did on March 20,
14 2020.

15 4. Dr. Drowbak ultimately performed surgery on plaintiff's thumb on May 26, 2020.

16 Evidence provided by defendants indicates that the delay of plaintiff's surgery was not
17 caused by Alamutu, and that Alamutu provided appropriate treatment as needed. Considering the
18 specific nature of the evidence provided, and the fact that plaintiff's assertions in his amended
19 complaint are general and often vague, defendants have met their initial burden of establishing
20 that there is no genuine issue of material fact as to whether Alamutu was at least deliberately
21 indifferent to the broken bone in plaintiff's right thumb. See Anderson v. Liberty Lobby, 477
22 U.S. 242, 247-48 (1986) ("[T]he mere existence of *some* alleged factual dispute between the
23 parties will not defeat an otherwise properly supported motion for summary judgment; the
24 requirement is that there be no *genuine* issue of *material* fact.") (Emphasis in original).

25 Plaintiff presents no argument in his opposition. Instead, plaintiff objects to the
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27 ³ Tylenol 3 includes a combination of acetaminophen and codeine.

28 ⁴ Vistaril is prescribed for anxiety and tension.

1 characterization of certain facts by defendants as undisputed. But plaintiff does not point to any
2 specific admissible evidence in support of his positions. With the lone exception described
3 below, the objections themselves are not evidence as the objections are not in affidavit form nor
4 signed under the penalty of perjury. While plaintiff attached exhibits to his opposition, the
5 exhibits concern the removal of stitches and pins from plaintiff's thumb post-surgery. Plaintiff
6 does not make any allegations in his complaint about post-surgical care or the removal of pins or
7 stitches,⁵ so any evidence concerning that care is not relevant to the claims that remain.

8 Since the evidence before the court fails to establish a genuine issue of material fact as to
9 whether defendant Alamutu was at least deliberately indifferent to the broken bone in plaintiff's
10 right thumb, Alamutu is entitled to summary judgment.

11 B. Nurse Burley

12 In her affidavit, Nurse Burley indicates she met with plaintiff concerning his thumb pain
13 three times.

14 1. On February 24, 2020, Burley examined plaintiff and noted that he had stable vital
15 signs, no swelling near his right thumb, and "cap refill."⁶ Plaintiff was prescribed Ibuprofen and
16 Tylenol 3.

17 2. On March 16, 2020, plaintiff arrived in the nurse station complaining that his hand
18 hurt. Burley examined the hand and noted that the skin was intact and there were no signs of a
19 compound fracture. Having been informed that plaintiff had been doing push-ups, Burley advised
20 plaintiff that exercising using his right hand could prevent healing of the broken thumb and cause
21 further injury.

22
23 ⁵ In his original complaint, plaintiff included allegations concerning post-operative care. ECF
24 No. 1 at 3. On July 7, 2021, the court screened plaintiff's original complaint as the court is
25 required to do under 28 U.S.C. § 1915A(a). The court found the original complaint failed to state
26 a claim upon which relief could be granted, granted leave to file an amended complaint, and
provided plaintiff with guidance as to the contents of his amended complaint. However, in the
amended complaint plaintiff makes no allegations concerning post-operative care.

27 ⁶ "Cap refill" refers to capillary refill, a test to determine blood flow in fingers; pressure is
28 applied and then released with the health care professional taking note of how long it takes blood
to return to the area where pressure was applied.

1 3. On March 27, 2020, Burley noted that plaintiff received a new spica thumb splint and
2 his Tylenol 3 prescription was changed to Salsalate.⁷

3 Burley does not indicate whether she ever gave plaintiff any kind of splint, nor that she
4 was directed to provide one. In his opposition, plaintiff admits it was not defendant Burley who
5 gave plaintiff a cardboard splint, but another nurse identified as Nurse Encina. ECF No. 48 at 9.
6 While plaintiff's statements in his opposition are generally not admissible because they are not in
7 affidavit form nor signed under the penalty of perjury, the admission that it was not Burley who
8 gave plaintiff the cardboard splint is admissible as an admission against interest under Fed. R.
9 Evid. 801(d)(2). Along with these facts, the court notes that defendant Burley is not a physician
10 and nothing in the record suggests she was qualified or authorized to make any meaningful
11 decisions regarding treatment. Further, there is no evidence that Burley ever denied plaintiff
12 access to a physician.

13 As with defendant Alamutu, the evidence provided by defendants indicates that Burley
14 was never at least deliberately indifferent to plaintiff's broken thumb. Considering this in
15 conjunction with the fact that, as with defendant Alamutu, plaintiff's assertions in his amended
16 complaint concerning Burley's alleged indifference are general and vague in nature defendants
17 have met their initial burden that, under evidence, there is no genuine issue of material fact that
18 defendant Burley was at least deliberately indifferent to plaintiff's broken bone in his thumb.

19 As to both defendants, plaintiff's opposition to defendants' motion for summary judgment
20 provides no argument. Further, while plaintiff objects to the characterization of certain facts by
21 defendants as undisputed, he does not point to any specific admissible evidence in support of his
22 positions. Finally, the exhibits he provided are not relevant to his remaining claims.

23 Therefore, the evidence before the court fails to establish a genuine issue of material fact
24 as to whether defendant Burley was at least deliberately indifferent to the broken bone in
25 plaintiff's right thumb. Accordingly, Burley is entitled to summary judgment.

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⁷ Sasalate is an anti-inflammatory medication.

1 V. Conclusion

2 Because there is no genuine issue of material fact as to whether defendants Alamutu or
3 Burley were at least deliberately indifferent to the broken bone in plaintiff's thumb in violation of
4 the Eighth Amendment, they are entitled to summary judgment. Furthermore, because the facts,
5 taken in the light most favorable to the plaintiff, do not demonstrate that defendants' conduct
6 violated a statutory or constitutional right clearly established at the time of defendants' conduct,
7 defendants are entitled to immunity under the qualified immunity doctrine. Saucier v. Katz, 533
8 U.S. 194, 201 (2001).

9 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 10 1. Defendants' motion for summary judgment (ECF No. 46) be granted; and
11 2. This case be closed.

12 These findings and recommendations are submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
14 after being served with these findings and recommendations, any party may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
17 objections shall be served and filed within fourteen days after service of the objections. The
18 parties are advised that failure to file objections within the specified time may waive the right to
19 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 Dated: February 9, 2024

21 
22 CAROLYN K. DELANEY
23 UNITED STATES MAGISTRATE JUDGE
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